A **SIME DARBY PROPERTY BHD v. GARDEN BAY SDN BHD & ANOTHER CASE**

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
B [ORIGINATING SUMMONS NO: WA-24C(ARB)-22-08-2016 & WA-24C(ARB)-20-07-2016]
31 JANUARY 2017

ARBITRATION: *Award – Setting aside – Demand for sums for works done – Counterclaim for delay in completing works – Arbitration award – Award on issues*
C *not presented – Application to High Court to set aside arbitral award – Whether arbitrator acted beyond jurisdiction – Whether there was breach of rules of natural justice – Whether award should be set aside – Whether award could be enforced*

Sime Darby Sdn Bhd ('Sime Darby') appointed Garden Bay Sdn Bhd ('Garden Bay') as a contractor for turfing and landscaping works for a project
D ('the project') for a lump sum of RM846,175.50. Disputes and differences arose between the parties and these were then referred to the arbitration. Garden Bay was the claimant at the arbitration and it claimed for the sum of RM338,666.39 being the balance remaining unpaid for works done, interests and costs. Sime Darby, as the respondent in the arbitration,
E counterclaimed for the sum of RM246,978 together with general damages for Garden Bay's delay in completing the project. The arbitrator awarded, *inter alia*, that Sime Darby pays Garden Bay the sum of RM282,512 with interests and costs. On Sime Darby's counterclaim, the arbitrator held that Garden Bay was liable to pay Sime Darby liquidated ascertained damages
F and went on to order costs of rectification of defects. Sime Darby filed an originating summons ('OS') under s. 37 and alternatively under s. 42 of the Arbitration Act 2005 ('AA') to set aside the whole of the arbitration award made partly in favour of Garden Bay where the claim was concerned and partly in Sime Darby's favour where the rectification work was concerned. On the other hand, Garden Bay filed an OS for the recognition of the
G arbitration award made pursuant to s. 38 of the AA. Both Sime Darby's and Garden Bay's OS were heard together. The issue that arose for consideration, *inter alia*, were (i) whether the arbitrator could make a finding based on an issue which was never presented; and (ii) whether by not inviting parties to present on the issue which formed the award, the arbitrator had acted beyond
H jurisdiction and breached the rules of natural justice.

Held (setting aside arbitration award; dismissing application to enforce award):

(1) If there has been a breach of natural justice under s. 37(2)(b) either
I (i) during the arbitral proceedings; or (ii) in connection with the making of the award, then the whole award has to be set aside. Parliament had

allowed an arbitration award to be set aside on grounds of breach of natural justice as an arbitral tribunal is enjoined under s. 20 of the AA by the use of the mandatory 'shall' to treat equally all parties; and give every party a fair and reasonable opportunity of presenting that party's case. (paras 17 & 21)

(2) Though the word limit was not used by the arbitrator, the arbitrator was limiting Sime Darby's counterclaim in the arbitration to the retention sum. The issue of whether the costs of rectification works that can be claimed is limited to the amount of the retention sum was not an issue which arose in the pleadings or in the course of the arbitration proceedings. The parties were not alerted to this issue by the arbitrator and were not invited by the arbitrator to submit on this issue. (para 36)

(3) There was an express clause in the conditions of contract that unambiguously provided for all costs to be recoverable from Garden Bay without any provisions limiting such sums to be recovered, the arbitrator could not assume that the parties had accepted otherwise in contradistinction to the pleadings and to the conduct of the parties' case. (para 38)

(4) The proper course for the arbitrator to take would be to invite the parties to submit on this new issue on whether parties by their conduct accepted the retention sum as the amount to be forfeited to Sime Darby in full payment for whatever might be the costs of the rectification works. However, this was not done and so the arbitrator went on to decide on an issue not at play and not pleaded and in that pejorative sense, an 'invented issue' and thus was in breach of natural justice in not allowing the parties to be heard on this new issue. (para 40)

(5) The arbitrator had ordered that the retention sum be set off from the final certificate amount. It was a decision that tainted the whole award such that the whole award had to be set aside. It was not possible to extricate the part of the award not affected from the part that was affected because one sum was extricably intertwined with the other such that one would affect the other. (para 41)

(6) Sime Darby had been prejudiced as a result of not having the opportunity to address the arbitrator on this new issue not at play and certainly not in the pleadings. So long as it was reasonably arguable that the arbitrator's decision might have been different had she had the benefit of submission from both parties, that would be enough for the court to set aside the award on grounds of breach of natural justice. (para 42)

(7) Having found that there was a breach of the rules of natural justice under s. 37(2)(b)(i) and (ii) of the AA that had occurred during the arbitral proceedings and in connection with the making of the award, the whole award was set aside. Sime Darby could not be expected to pay the Garden Bay the final sum awarded in the award that had allowed the sum for rectification works arrived at in breach of natural justice to be deducted from the final certificate amount. The award had ventured into a dispute not contemplated by or not falling within the terms of the submission to arbitration and as such the consequence was that the whole of the award had to be set aside. (para 46)

Case(s) referred to:

AKN & Anor v. ALC & Ors And Other Appeals [2015] SGCA 18 ***(refd)***
Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617 CA ***(refd)***
LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and Another Appeal [2013] 1 SLR 125 ***(refd)***
Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd [2015] 3 MLRH 116 ***(refd)***
Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd [2016] 3 CLJ 403 CA ***(refd)***
Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd [2015] 1 LNS 1094 HC ***(refd)***
Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 20, 21(3)(b), 26(5), 30(5), 37(1)(a)(iv), (b)(ii), (2)(b)(i), (ii), (6), 38, 42(3)

Arbitration Act (Cap 10) [Sing], s. 48(1)(a)(vii)

(Originating Summons No: WA-24C-20-07-2016)
For the plaintiff - Colin Victor; M/s James Edwin & Co
For the defendant - Raymond Mah & Liow Pei Xia; M/s Mah Weng Kwai & Assocs

(Originating Summons No: WA-24C-22-08-2016)
For the plaintiff - Raymond Mah & Liow Pei Xia; M/s Mah Weng Kwai & Assocs
For the defendant - Colin Victor; M/s James Edwin & Co

Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:

[1] Sime Darby Sdn Bhd ("Sime Darby") had issued a letter of acceptance ("LoA") dated 8 February 2011 and duly accepted by Garden Bay Sdn ("Garden Bay"), appointing Garden Bay as a contractor for turfing and landscaping works for a project known as "Cadangan Pembangunan Landskap bagi Membina 132 Unit Rumah Teres Dua Tingkat Dan Tiga Tingkat Serta Dua Unit Pencawang Elektrik Di Fasa I-8, Seksyen U16, Denai Alam, Shah Alam, Selangor Darul Ehsan" for a lump sum of RM846,175.50 ("the project").

[2] The date of site possession was stated to be 1 March 2011 and the date for completion was stated to be on 24 May 2011 ie, the overall completion period was stated to be 12 weeks.

[3] Disputes and differences arose between the parties and these were then referred to arbitration as stipulated in cl. 54 of the conditions of contract. The parties could agree on a single arbitrator and the learned arbitrator appointed duly gave directions on pleadings, bundle of documents and witnesses statements to be filed.

[4] Garden Bay was the claimant at the arbitration and it claimed for the sum of RM338,666.39 being the balance remaining unpaid, interests and costs.

[5] Sime Darby as respondent in the arbitration counterclaimed for the sum of RM246,978 together with general damages for the claimant's delay in completing the landscape works to be assessed by the arbitrator together with interests and costs.

[6] As directed by the arbitrator, the parties filed their respective pleadings, bundles of documents and witnesses' statements.

The learned arbitrator heard witnesses from both the parties and on 6 November 2014, handed down her arbitration award (exh. A-1 Sime Darby's affidavit in support).

[7] In para. 5.0 of the arbitration award, the arbitrator determined and awarded the following:

(a) Sime Darby pays Garden Bay the sum of RM282,512 as the final amount due to Garden Bay as at 23 October 2013;

(b) Sime Darby pays Garden Bay simple interest at the rate of 5% per annum on the said sum of RM282,512 calculated from 23 October 2013 until the date of the arbitration award;

(c) Sime Darby pays Garden Bay simple interest at the rate of 5% per annum on the said sum of RM282,512 from the date of the arbitration award until full and final satisfaction of the said sum;

(d) Sime Darby pays Garden Bay the cost of the arbitration of RM20,500;

(e) Sime Darby pays its own cost and the cost of its solicitor; and

(f) Sime Darby pays Garden Bay cost and the cost of its solicitor on a client - solicitor basis to be taxed by the court.

[8] On the respondent's counterclaim the learned arbitrator found as follows at para. 4.40:

> Considering all the facts and circumstances available to the Arbitrator for this arbitration, I find and hold the Claimant is liable to pay LAD of RM35,000.00 to be set off from the Final Certificate Amount of RM338,666.39 due to the Claimant.
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> As to costs for rectification work not completed as at 26 December 2012, I find and hold that the amount of Claimant's liability is 2 1/2% of Contract Sum amounting to RM21,154.39 as per Para 2.35, to be set off from the Final Certificate Amount of RM338,666.39 due to the Claimant.

[9] There was a previous consent judgment where the parties had agreed that the learned arbitrator, pursuant to s. 42(3) AA 2005 be ordered to state in sufficient detail the reasons for the finding that Garden Bay is liable for RM21,154.39 as costs of rectification of defects when Sime Darby's claim for rectification of defects by the third party was at RM246,978.00.

[10] The arbitrator then handed down the supplementary arbitration award dated 28 October 2015. As the previous originating summonses had already been closed by the court after the record of the consent judgment, parties had filed their respective current originating summonses referred to above.

Prayers

[11] Sime Darby had filed an originating summons under s. 37 and alternatively under s. 42 of the Arbitration Act 2005 (AA) to set aside the whole of an arbitration award made partly in favour of Garden Bay where the claim is concerned and partly in Sime Darby's favour where the rectification work is concerned.

[12] In particular, Sime Darby had prayed for the setting aside of the whole award under ss. 37(1)(a)(iv), 37(1)(b)(ii), 37(2)(b)(i) and 37(2)(b)(ii) AA.

[13] The questions of law referred to the court by Sime Darby under s. 42 AA are as follows:

(a) Whether the arbitrator could make a finding based on an issue, which was never presented or argued before her; and

(b) Whether by not inviting parties to present or argue on the issue which formed the award, the arbitrator had acted beyond her jurisdiction and breached the rules of natural justice.

On the other hand, Garden Bay filed an originating summons for recognition of the arbitration award made pursuant to s. 38 AA. Both Sime Darby's and Garden Bay's originating summonses were heard together by consent of the parties.

[14] The parties shall be referred to as claimant and respondent as they appeared in the arbitration or sometimes by their names as Garden Bay and Sime Darby respectively.

Principles

[15] The interplay between a s. 37 *vis-a-vis* a s. 42 application under the AA had been discussed in the recent case of *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403; [2016] 2 MLRA 407, 2 MLRA 687. The Court of Appeal had succinctly differentiated between the basis of applications filed pursuant to ss. 37 and 42 AA as follows:

> [12] An application to set aside an award under s. 37 largely deals with issues relating to the award making process and has nothing to do with error of facts and/or law on the face of record unless the exception applies; such as public policy. An application under s 42 has nothing to do with the award making process but has everything to do with the award *per se* and error of law on the face of record which error substantially affects the rights of one or more of the parties. The distinction between ss. 37 and 42 is that like of an apple and an orange ...
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> [14] The threshold to satisfy under s. 37 is very low (though the courts are slow in setting aside the award) and upon proof if successful, the court has an option to send back the matter to the arbitral tribunal to eliminate the grounds for setting aside, as set out in s. 37(6). This was not done in this case. To put it in another way when a party to the arbitration complains of breach related to s. 37(1)(a)(iv) and/or (v) etc, he must invite the court's attention to s. 37(6) and cannot rely on s. 42 as it will be an abuse of process, as he is relying on omission or excess of jurisdiction which is covered under s. 37 and not s. 42 of AA.
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> [15] In addition, once the applicant had chosen to rely on s 37 grounds as stated earlier, that will mitigate a no-case under s 42. I do not think it will be a proper exercise of judicial power to entertain an application under s. 42 when the applicant is relying on the same facts as advocated for a s. 37 application. In my considered view, a trial court ought not to entertain an application under s 42 at all. I will explain this further.
>
> [16] The threshold to satisfy s 42 requirements is very high and I will say in consequence of case laws, it is extremely high. That is to say, if a party cannot succeed under s 37, on the same facts and complaint the general jurisprudence will dictate an application under s. 42 will be futile as s. 37 relates to arbitral process and s. 42 relates to arbitral award.

[16] Section 37 AA provides:

(1) An award may be set aside by the High Court only if:

(a) the party making the application provides proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) **the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration**;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this act; or

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) **the award is in conflict with the public policy of Malaysia**.

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where:

(a) the making of the award was induced or affected by fraud or corruption; or

(b) **a breach of the rules of natural justice occurred**

(i) **during the arbitral proceedings; or**

(ii) **in connection with the making of the award.**

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

(4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(6) On an application under subsection (1) the High Court may, where appropriate and so requested by a party, adjourn the proceedings for such period of time as it may determine in order to allow the arbitral tribunal

an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(7) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into the High Court or otherwise secured pending the determination of the application. (emphasis added)

Whether There Has Been A Breach Of Natural Justice When The Arbitrator Decided That By Conduct, The Parties Have Accepted That The Respondent's Claim For Rectification Works Is The Sum Retained As Retention Sum Under The Contract

[17] It is generally agreed that if there has been a breach of natural justice under s. 37(2)(b) either (i) during the arbitral proceedings; or (ii) in connection with the making of the award, then the whole award has to be set aside.

[18] In *Petronas Penapisan (Melaka) Sdn Bhd (supra)*, the Court of Appeal held that:

[36] It is our view that s 37 only allows the court to set aside the award save for the limited exception under s 37(3) of the said Act.

[19] Thus, even in a case that succeeds under s. 37(1)(a)(iv) AA, the court would be constrained to set aside the whole of the award. In *Magna Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd* [2015] 3 MLRH 116, MLJU 291 the High Court held that:

[27] Learned counsel argued that the New Zealand Act had combined both the limbs found in our subparagraphs 37(1)(a)(iv) and (v) under one section, allowing the court to set aside part of an award on either ground. As such, it was submitted that our subsection (3) is equally applicable to subparagraph 37(1)(a)(v)*(sic)*.

[28] With respect, the court disagrees. As can be seen from the provisions, the legislative content of the relevant provision of the law (cl. 5 in Schedule 2 of New Zealand's Arbitration Act 1996) is quite different from our s. 37. The differences in the two pieces of legislation can only be said to be deliberate on the part of our Parliament. In view of the express provision in subparagraph 37(1)(a)(v), it is furthermore not the function of this court to read otherwise, just because that is how another jurisdiction has chosen to draft its law.

[29] In determining this issue of jurisdiction under s. 37, it is also correct to say that where the plaintiff is seeking to set aside only a part of the award, which is the case here, then subparagraph 37(1)(a)(iv) is not available to the plaintiff. When the conditions of subparagraph 37(1)(a)(iv) are met, the whole award will be set aside; and not just that part which

is challenged; unless of course, if the same complaints can be raised under subparagraph 37(1)(a)(v). This is clear from a plain reading of subparagraphs 37(1)(a)(iv) and (v).

[30] Only subparagraph 37(1)(a)(v) provides that it is "Subject to subsection (3)" while subparagraph 37(1)(a)(iv) is silent. As opined earlier, the absence of these critical words in subparagraph 37(1)(a)(iv) is deliberate. The court must heed that clear intention of Parliament, especially in view of s 8 which reminds the court of a minimalistic approach in its intervention in arbitration and arbitration related matters.

[20] The Court of Appeal in *Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* (*supra*) gave some guidance on the scope of a breach of natural justice in the setting aside of an arbitral award. Justice Prasad Abraham JCA observed as follows:

[34] In dealing with the defendant's counterclaim, the arbitral tribunal in this case found the defendant was not entitled to recover any loss or damages arising from the termination of the contract. The arbitral tribunal found absence of evidence to support its counterclaim. The arbitral tribunal then went on to say that it would proceed to use the factor of inflation set at 20% being a reasonable sum and the arbitral tribunal proceeded to find on the following basis. The balance of 30% of the contract price RM260,470.20 add 20% inflation RM52,094.04 = RM312,564.24.

[35] *This issue was not brought up by the parties nor were the parties alerted to it nor invited to address that point and therefore the award in our view contains decisions on matters beyond the scope of the submission to arbitration in breach of ss. 37(1)(a)(v) and 37(1)(b) of the Arbitration Act 2005 ('the Act')* and raises question of law under s 42 of the said Act.

...

[41] We refer also to the case of *OAO Northern Shipping Co v. Remolcadores de Marin SLp, The Remmar* [2007] 2 Lloyd's Rep 302 and to the judgment of Gloster J, DBE which we quote:

> 16 The primary ground relied upon by Buyers in the present case is: '(a) failure by the tribunal to comply with section 33 (general duty of tribunal)'. Section 33 provides as follows:
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> (1) The tribunal shall -
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> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
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> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

17 Alternatively, Mr Henton submitted that the application can be dealt with underground (c), as set out in section 68(2), of 'failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties'.

18 Mr Henton recognised that the section 68 threshold is a high one, the aim being to eliminate technical and unmeritorious challenges and promote finality of dispute resolution. Section 68 must not be used for disguised challenges to the correctness of a decision on the facts or law, especially where (as here) the right of appeal under section 69 has been excluded by agreement. In the words of the DAC's Report on the Arbitration Bill (referred to in *Lesotho* at paragraph 27):

> [s 68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.

19 Having said that, the DAC, and their lordships in *Lesotho*, also recognised that a party's right to a fair and impartial hearing is a fundamental one. An inability on the part of the court to intervene could seriously undermine the international reputation of English arbitration.

20 Where the challenge is made under section 68(2)(a), the seriousness of the irregularity must be judged in accordance with the fundamental principles laid down in a series of cases which *ante-date* the 1996 Act, but which have been repeatedly upheld as reflecting the principles enshrined in section 68(2)(a):

21 Thus, Ackner LJ in *The Vimeira* [1984] 2 Lloyd's Rep 66, 76) stated:

> **The essential function of an arbitrator … is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be** and, at the conclusion of the evidence, it should be apparent **what issues still remain live issues**. If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but **the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it** ...
>
> the adequacy of the turning area was not at the conclusion of the evidence - even though it was a possible issue at the commencement of the arbitration - any longer a live issue. The arbitrators clearly thought otherwise. They should have so informed the parties ...

and (per Bingham LJ) in *Zermalt Holdings SA v. Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at p 15:

> *If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance …*
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> 22 **These principles apply to unargued points of law or construction as they do to unargued questions of fact**. In such cases, whilst it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties '**a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion**' (*ABB AG v. Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 70).
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> [42] We are therefore in agreement with the learned judge that the arbitral tribunal had by the manner it had proceeded, caused substantial injustice and the whole process was irregular. (emphasis added)

[21] It may be surmised that Parliament had allowed an arbitration award to be set aside on ground of breach of natural justice as an arbitral tribunal is enjoined under s. 20 AA by the use of the mandatory "shall" to:

(i) treat equally all parties; and

(ii) give every party a fair and reasonable opportunity of presenting that party's case.

[22] The Singapore Arbitration Act also has a similar provision in their s. 48(1)(a)(vii) of the Act which reads as follows:

> 48.(1) An award may be set aside by the Court -
>
> (a) if the party who applies to the Court to set aside the award proves to the satisfaction of the Court that -
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> ...
>
> (vii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced;

[23] Cases across the causeway would be relevant in helping to throw some light on the ambit of the breach of natural justice as a ground to set aside an arbitration award.

In *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Soh Beng Tee*"), the Singapore Court of Appeal held at [29] that a party challenging an arbitration award as having contravened the rules of natural justice has to establish the following:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

[24] The Singapore Court of Appeal then summarised the principles relating to the application of rules of natural justice which should be adopted for both international and domestic arbitration at [65] some of which are as follows:

> (a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute ... The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision(s) on matters not submitted or argued before him ...
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> (d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge ...
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> (f) Each case should be decided within its own factual matrix. I must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

[25] The Singapore Court of Appeal further clarified in *LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd and Another Appeal* [2013] 1 SLR 125, what is meant by breaches of rules of natural justice which have actually caused prejudice that warrants the court's intervention in setting aside the award:

A The test of prejudice in determining whether an arbitral award should be set aside

> 50 To begin, it is the last of the quoted paragraphs above that warrants some attention. What is the threshold of prejudice that must be crossed before a court may intervene under s 48(1)(a)(vii) of the Act? It is undoubtedly the case that not every breach of the rules of natural justice will in itself amount to the required "prejudice" (see *Soh Beng Tee* at [83]-[84]). In *Soh Beng Tee*, this court was careful to state that there must be some causal connection between the breach of natural justice and the making of the award in order to establish actual or real prejudice. This is reflected in *Soh Beng Tee* at [86] and [91]:
>
> > 86 It is necessary to prove that the breach, if any, had caused actual or real prejudice to the party seeking to set aside an award. It may well be that though a breach has preceded the making of an award, the same result could ensue even if the arbitrator had acted properly
> >
> > 91 ... It appears to us that in Singapore, an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness. It is neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in the future. What we can say is that to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award.
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> 51 These passages should not be understood as requiring the applicant for relief to demonstrate affirmatively that a different outcome would have ensued but for the breach of natural justice. Nor conversely do they mean that the application for relief is bound to fail if there is a possibility that the same result might have been arrived at even if the breach of natural justice had not occurred. However, this was the way in which counsel, Mr Tan Liam Beng ("Mr Tan"), framed his arguments for the Defendant. In our view, the principal requirement that was highlighted in

Soh Beng Tee at [91] is the demonstration that "there has been some actual or real prejudice caused by the alleged breach ... [which] is obviously a lower hurdle than substantial prejudice, [though] it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis".

52 The threshold of "substantial injustice" is adopted in s. 68(2) of the UK Arbitration Act 1996. In *Soh Beng Tee* ([48] *supra*), this court considered (at [91]) that the threshold to be applied in Singapore should indeed be lower:

> 91 ... It does, however, appear that Parliament, in steering away from the 'substantial injustice' formula adopted in the UK Arbitration Act 1996, had intended to set a lower bar to establish a remediable 'prejudice'. The statutory formula adopted in England would only bite in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that the court would take action. ...

53 Robert Merkin and Louis Flannery, having reviewed the authorities interpreting s 68(2) of the English Arbitration Act 1996, summarised the position in their book as follows (see Robert Merkin & Louis Flannery, *Arbitration Act 1996* (Informa Publishing, 4th Ed, 2008) at p 158):

> ... the Court's task on [an application alleging the breach of the right of fair hearing] is not to second-guess the tribunal's views on any additional submissions which one side might have made if called upon to do so. **It may be sufficient if that party has been deprived of the opportunity to advance submissions which were 'at least reasonably arguable', or even simply something better than 'hopeless'** (emphasis added)

54 The proliferation of labels may not ultimately be helpful. Nevertheless, it is important to bear in mind that it is never in the interest of the court, much less its role, to assume the function of the arbitral tribunal. *To say that the court must be satisfied that a different result would definitely ensue before prejudice can be said to have been demonstrated would be incorrect in principle because it would require the court to put itself in the position of the arbitrator and to consider the merits of the issue with the benefit of materials that had not in the event been placed before the arbitrator*. Seen in this light, it becomes evident that the real inquiry is whether the breach of natural justice was merely technical and inconsequential or **whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations**. Put another way, the issue is **whether the material could reasonably have made a difference to the arbitrator**; rather than whether it would necessarily have done so. Where it

> is evident that there is no prospect whatsoever that the material if presented would have made any difference because it wholly lacked any legal or factual weight, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator (cf *Soh Beng Tee* at [86]). (emphasis added)

[26] Our courts are not shackled by the "prejudice" test as in Singapore or the "substantial injustice" test as in the UK. Any breach of natural justice not in the manner of a technical or inconsequential breach would be sufficient for the court to intervene under a s. 37(1)(b)(ii) read with s. 37(2)(b) application to set aside.

[27] Translated into practical terms, the test to be applied whenever there is a setting aside of an arbitration award on ground of breach of natural justice would be as follows as explained in the *Soh Beng Tee*'s case:

> 29 *It has been rightly held in John Holland Pty Ltd v Toyo Engineering Corp (Japan) [2001] 2 SLR 262 ("John Holland"), at [18], that a party challenging an arbitration award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights. The rule of natural justice alleged to have been breached in the present case is the alleged right of Fairmount to be heard on an issue that it maintains was crucial to the outcome of the Arbitrator's decision in the circumstances, the core issues on appeal telescoped into the following:*
>
> *(a) whether the Disputed Issue was alive during the arbitration or whether it was, as the trial judge found, "entirely the arbitrator's own idea";*
>
> *(b) if there was a breach of natural justice, how that breach affected the Award; and*
>
> *(c) whether the breach was merely technical or whether it has caused prejudice to Fairmount.*
>
> ...
>
> 41 In addition, even if we were to determine that the issue of whether time was at large was not truly alive during the arbitration, that *per se* would not be sufficient to inexorably lead to the conclusion that the Arbitrator had necessarily failed to adhere to the rules of natural justice in denying Fairmount an occasion to present its contentions on the issue. *It is frequently a matter of degree as to how unexpected the impugned decision is, such that it can persuasively be said that the parties were truly deprived of an opportunity to argue it. As helpfully summarised in Sir Michael J Mustill & Stewart C Boyd, The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Commercial Arbitration*") at p 312:
>
> *If the arbitrator decides the case on a point which he has invented for himself, he creates surprise and deprives the parties of their right to address full*

> *arguments on the base which they outside the course of the oral hearing, he breaks the rule that a party is entitled to know about and test the evidence led against him*. (emphasis added)
>
> (emphasis added).

[28] See also the recent Singapore Court of Appeal case of *AKN & Anor v. ALC & Ors, And Other Appeals* [2015] SGCA 18.

[29] Learned counsel for Garden Bay argued that Sime Darby's counterclaim for the alleged costs of rectification works is one of the issues put forward by Sime Darby in its counterclaim and its witness had in fact given testimony on this issue. Both parties also submitted on this in great detail. These can be seen in Sime Darby's affidavit in support at pp. 598 - 599, 605 - 609, 625 - 630, 652 - 655 and 680 - 692.

[30] According to him, the arbitrator, after considering the facts in this case, went on to hold that Garden Bay was liable in the sum of RM21,154.39 as cost of rectification of defects. Learned counsel for Garden Bay then submitted that the determination of the quantum of damages by the arbitrator is a determination of fact.

[31] Whilst this court has no business to question the finding of facts of the arbitrator, this court may nevertheless set aside the said finding if it was made outside the pleadings of the parties and if it was not an issue in play at the end of the arbitration and neither was it an issue submitted on by the parties.

[32] The arbitrator had held at para. 4.23 of the award that the claimant has to be liable for rectification works under its scope as instructed by the SO. She then went on to hold that:

> By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification works as per the usual practice in construction contracts, although not provided for in the Contract for this matter.

[33] When the parties had not conducted the case in that manner, the respondent Sime Darby was rather perplexed as to how such a determination had been arrived at. The claimant's case was that they had done all the rectification works. The respondent's case was that they had engaged a third party contractor to rectify the defective works and that under cl. 5(b) of the conditions of contract they were entitled to recover all costs incurred thereby.

[34] The relevant clauses in the conditions of contract are cl. 4 and cl. 5(b) which reads as follows:

> 4. The Contractor shall upon and subject to these Conditions construct and complete the Works shown upon the Contract Drawings and described by or referred to in the Bills of Quantities and/or Specification

A and in the Articles of Agreement and these Conditions in compliance therewith, using materials, moods and workmanship of the quality and standards therein specified. The Contractor shall also make good any defect, imperfection, shrinkage or any other fault whatsoever which may appear during the Defect Liability Period in accordance with Clause 45 hereof.

B ....

5(b) The Contractor shall (subject to sub-clause(c) hereof) forthwith comply with all instructions issued to him by the S.O. If within seven (7) days after receipt of a written notice from the S.O. requiring compliance with an instruction the contractor does not comply therewith, then the C S.O. without prejudice to any other rights or remedies available to the Government under the Contract may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instruction and all costs incurred in connection with such employment shall be recoverable from the Contractor by the Government D or the S.O. on its behalf as a debt or may be deducted by the Government from any monies due or to become due to the Contractor under this Contract.

[35] After the consent judgment recorded by the parties for the arbitrator to give her reasons for the said finding, the arbitrator maintained the reason E as stated in para. 2.5 of the supplementary award that:

By conduct, both Parties had accepted Retention Sum as a mode to allocate funds for rectification works as per the normal practice in construction contracts.

As per F/A Para 2.35, the Respondent had retained RM21,154.39 F as Retention Sum under Employer's Payment Advice dated 29 March 2012 as the cost of the Claimant's liability for outstanding rectification of defects.

[36] Though the word limit was not used by the arbitrator, clearly the arbitrator was limiting the respondent's counterclaim in the arbitration to the G retention sum. I find merits in the submission of learned counsel for the respondent Sime Darby that the issue of whether the costs of rectification works that can be claimed is limited to the amount of the retention sum, was not an issue which arose in the pleadings or in the course of the arbitration proceedings. The parties were not alerted to this issue by the arbitrator and H were not invited by the arbitrator to submit on this issue.

[37] Learned counsel for Sime Darby further submitted that during the course of the arbitration proceedings, the contention that parties had agreed to limit the rectification costs to the retention sum was never put to Sime Darby's witnesses by the claimant's counsel during cross-examination.

I

[38] I can appreciate the respondent's counsel argument that when there is an express clause in cl. 5(b) of the conditions of contract that unambiguously provided for all costs to be recoverable from the claimant without any provisions limiting such sums to be recovered, the arbitrator cannot assume that parties had accepted otherwise in contradistinction to the pleadings and to the conduct of the parties' case.

[39] It was not the claimant's case that the parties had expressly agreed by conduct to limit the rectification costs to the retention sum; indeed their position was based solely on the argument that the appointment of Muzqi (third party contractor) was unnecessary and contractually unjustified as the claimant had completed all works and had rectified all defects.

[40] The proper course for the arbitrator to take would be to invite the parties to submit on this new issue that had irked her on whether parties by their conduct accepted the retention sum as the amount to be forfeited to the respondent in full payment for whatever might be the costs of the rectification works. However, this was not done and so the arbitrator went on to decide on an issue not at play and not pleaded and in that pejorative sense, an 'invented issue' and thus was in breach of natural justice in not allowing the parties to be heard on this new issue.

[41] As the arbitrator had ordered that this retention sum of RM21,154.39 be set off from the final certificate amount of RM338,666.39, it is a decision that taints the whole award such that the whole award has to be set aside. It is not possible to extricate the part of the award not affected from the part that is affected because one sum is in extricably intertwined with the other such that one would affect the other.

[42] It is not for this court to second-guess what her decision would have been if she had heard the parties on this issue of the retention sum being all that the respondent could claim for rectification works. It is sufficient to be set aside if this court finds that the respondent had been prejudiced as a result of not having the opportunity to address the arbitrator on this new issue not at play and certainly not in the pleadings. So long as it is reasonably arguable that the arbitrator's decision might have been different had she had the benefit of submission from both parties, that would be enough for the court to set aside the award on ground of breach of natural justice.

[43] It may further be added that if the arbitrator had wanted to rely on her knowledge of what she understood to be the usual practice in construction contracts, then she should inform the parties about it and invite them to challenge such an understanding of usual practice. I am not unaware that an arbitral tribunal shall have the power under s. 21(3)(b) AA to draw on its

A own knowledge and expertise in deciding on a dispute before it. Likewise, an arbitrator shall decide based on the usual practice in the building industry as provided for under s. 30(5) AA which reads:

> (5) The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and shall take into account the usages of the trade
B applicable to the transaction.

I am also mindful of s. 26(5) AA that reads:

> Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

C **[44]** However, that is no liberty nor license to decide on an issue dehors the pleadings and what is submitted for decision for an arbitrator's jurisdiction is derived by consent of the parties in the agreement to submit to arbitration as may be gathered from the pleadings and submissions of the parties.

D **[45]** I would follow the approach taken by Justice Wong Kian Kheong JC in *Sigur Ros Sdn Bhd v. Master Mulia Sdn Bhd* [2015] 1 LNS 1094 where His Lordship observed as follows:

> 49. Section 21(3)(b) AA allows the Arbitrator to "draw on its own knowledge and expertise". According to s. 26(5) AA, any expert report or
E document relied on by a Tribunal in making its decision, should be communicated to parties. I am of the opinion that in view of ss. 20, 26(5), 37(1)(b)(ii) and 37(2)(b) AA, **if a Tribunal draws on its own expertise, experience and knowledge pursuant to s. 21(3)(b) AA, the Tribunal should have informed the parties of such a matter and invite parties to adduce evidence (or expert evidence) and submit on such a matter**. I rely
F on Ackner LJ's (as he then was) judgment in the English Court of Appeal case of *Interbulk Ltd v. Aiden Shipping Co Ltd, The Vimeira* [1984] 2 Lloyd's Rep 66, at 76, as follows:
>
> > *If an arbitrator considers that parties or their experts have missed the real point - a dangerous assumption to make, particularly where, as in this case,*
> G *the parties were represented by very experienced Counsel and solicitors - then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it*. (emphasis added).

H **[46]** Having found that there was a breach of the rules of natural justice under s. 37(2)(b)(i) and (ii) AA that had occurred during the arbitral proceedings and in connection with the making of the award, this court would be constrained to set aside the whole award. Surely in the circumstance the respondent cannot be expected to pay the claimant the final
I sum awarded in the award that had allowed the sum for rectification works arrived at in breach of natural justice to be deducted from the final certificate amount yielding the sum of RM282,512.

Whether The Award Deals With A Dispute Not Contemplated By Or Not Falling Within The Terms Of The Submission To Arbitration When The Arbitrator Decided That By Conduct, The Parties Have Accepted That The Respondent's Claim For Rectification Works Is The Sum Retained As Retention Sum Under The Contract

[47] The Court of Appeal in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 had explained how an arbitrator might fall into the jurisdictional error as in acting in excess of his jurisdiction as envisaged in s. 37(1)(a)(iv) AA as follows:

> "Finding Of New Difference" By The High Court
>
> [22] The learned High Court Judge considered the background facts in some detail. Her Ladyship also evaluated the issues formulated by the arbitrator, as agreed and modified by both parties. Her Ladyship considered the detailed finding of the arbitrator, which was quoted *in extenso*, but concluded that the arbitrator had decided on a dispute which was not contemplated by, or not falling within the terms of the submission to arbitration. This is an area of arbitration law which allows the court to set aside an award on the ground that an arbitrator had decided on a "new difference" which is irrelevant to the claim, the "new difference" being understood as a new dispute not contemplated by or not falling within the terms of the arbitration submission. The underlying rationale for this rule rests on the consensual nature of arbitration. Parties are not compelled to resort to arbitration contractually, but if they provide for it and refer their dispute to arbitration, *the mandate of the arbitrator must be limited to the terms defined by the parties for him to exercise his jurisdiction. If the arbitrator strays from the confines of this mandate, he will be acting in excess of his jurisdiction, even though he may have the initial and primary jurisdiction to arbitrate between the parties*. This rationale is stated succinctly by the Court of Appeal, Singapore in *PT Prima International Development v. Kempinski Hotel SA & Other Appeals* [2012] SGCA 35:
>
> > An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.
>
> [23] This case was cited by Her Ladyship, together with several other decisions of the Singapore Courts, such as *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR (R) 597, *CRW Joint Operation v. PT Perusahaan Gas Negara* [2011] 4 SLR 305 and *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1.
>
> [24] These persuasive cases, and others, that have been addressed by our courts lay down one basic principle - **an arbitrator must decide the dispute according to the scope of the arbitration and he cannot decide the dispute**

on issues that have not been raised or addressed by the parties. This basic principle arose in the High Court case of Government of the *Lao People's Democratic Republic v. Thai-Lao Lignite Co Ltd ("TLL") A Thai Company & Anor* [2013] 1 LNS 83, where Lee Swee Seng JC (as he then was) said:

> Whilst it is generally stated that under the Model Law regime as reflected in the AA 2005, there is a palpable shift towards non-interference in international arbitration award especially on issues of error of law so called, yet where jurisdiction is concerned, the Model Law does recognize and respect court's interference where arbitrators have acted outside their jurisdiction and this principle is reflected in ss. 37(1)(a)(iv) and (v) of the AA 2005 ... (at pg. 18 of the Judgment)
>
> [25] Lee Swee Seng, JC expressly referred to and adopted the reasoning shown in the Singapore authorities, namely *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, *supra*, and *CRW Joint Operation v. PT Perusahaan Gas Negara*, *supra*.
>
> [26] A differently constituted panel of this court agreed with the High Court's decision and dismissed the appeal. (emphasis added).

[48] Here, while it was within the parties' submission to arbitration that the arbitrator should decide on whether the respondent was entitled to the sum of RM246,978 being the costs of rectification works or such other amount as may be assessed by the arbitrator or not at all, it certainly was not within the submission and contemplation of the parties that the arbitrator would be deciding on whether there was consent between the parties by conduct that the respondent had accepted the retention sum as the amount they are entitled to in the event that rectification works have to be done. What is even more perplexing is that in the very next breath the arbitrator had held that this is so "although not provided for in the contract for this matter".

[49] The arbitrator had earlier set out cl. 5(b) which is the provision in the contract for this matter.

[50] Here, we are not quibbling or questioning the finding of fact of the arbitrator but we are dealing with a far more basic issue which is whether the parties had agreed in their submission to arbitration that the arbitrator should be deciding on this very matter of whether there was such a conduct of the parties on the acceptance of the retention sum as all that the respondent could claim in the event of rectification works that are needed to be done.

[51] The answer is a resounding 'no'!, being not a matter pleaded or at play in the arbitral proceedings or in the submission filed by both parties.

[52] That being the case, the award has ventured into a dispute not contemplated by or not falling within the terms of the submission to arbitration and as such the consequence is that the whole of the award has to be set aside.

[53] As I had decided for the respondent Sime Darby under the setting aside application under s. 37 AA, there is no need then to continue to consider the respondent's application under s. 42 AA.

Pronouncement

[54] For all the reasons above, I allowed the application to set aside the arbitration award under s. 37(1)(a)(iv) and 37(1)(b)(ii) and 37(2)(b)(i) and (ii) AA and accordingly dismissed the application to enforce the award.

After hearing the parties, I made no order as to costs.